LENA C. TAYLOR

Wisconsin State Senator • 4th District

HERE TO SERVE YOU!

Senate Committee On Judiciary, Corrections, and Housing
Testimony of Senator Lena C Taylor
Senate Bill 319 – The Jury Sunshine Act
Tuesday, January 29th, 2008

Honorable Senators;

Thank you for your time today to address you on Senate Bill 319—The Jury Sunshine Act.

This legislation is part of the ongoing work that I am doing in helping to make the Justice System work for all people. I have partnered with the Wisconsin Association for Justice on this bill and look forward to their testimony today.

Let me explain the bill. This legislation would require judges to inform jurors of the impact of their verdict in civil cases. Wisconsin is currently one of only three states that have not adopted what is commonly referred to as the "sunshine rule" in civil cases. This bill also allows the legal counsel for both parties to comment on the courts explanation.

In criminal proceedings, currant law provides that juries must be apprised of the potential consequences of their verdict. This is provided to jurors as part of their initial jury instructions. However, in civil cases no such information regarding consequences of findings is provided.

In moving this legislation forward, I am open to examining any amendments or changes that can help make justice work for the better in Wisconsin. I am confident that the Wisconsin Association of Justice will help to provide clarity and real life examples of the impact of this legislation before the committee today. I encourage you to support this bill.

Thank you.

Madison: State Capitol, PO Box 7882, Madison, WI 53707-7882 • Phone: (608) 266-5810 • Fax: (608) 267-2353
Toll-free: 1-888-326-6673 • E-mail: Sen.Taylor@legis.wisconsin.gov • Web: www.legis.wisconsin.gov/senate/sen04/sen04.html
District: 3428 West State Street, Milwaukee, WI 53208 • Phone: (414) 342-7176 • Fax: (414) 344-1566

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Committee on
JUDICIARY AND CORRECTIONS

Senator Lena Taylor, Chairperson

Public Hearing on 2007 Senate Bill 319

January 29, 2008

CHAIR[redacted] TAYLOR AND MEMBERS OF THE COMMITTEE, my name is Eric Farnsworth. I am a partner in the law firm of Dewitt, Ross & Stevens in Madison, Wisconsin. I also serve on the Board of Directors of the Wisconsin Association for Justice, formerly the Wisconsin Academy of Trial Lawyers. I appear today in support of Senate Bill 319. Thank you for this opportunity to testify.

Senate Bill 319 will require judges to tell jurors the impact certain laws will have on the answers they give to the special verdict questions. In effect, the bill authorizes the judge to tell the jury how the case will turn out depending on how they answer the questions. It also will permit counsel for each party to comment on the court's explanation during closing argument.

The Wisconsin Association for Justice supports this bill because we believe it will help juries in their deliberations. Our members are lawyers who stand before juries every day and are among the strongest supporters of the jury system. Jurors invariably take their responsibility very seriously; they listen carefully to the evidence and try their very best to answer the verdict questions in a responsible manner. They bring the collective wisdom and values of the community to bear in their decision-making process. They want very much to do the right thing for the parties involved, but sometimes are hampered because we intentionally withhold information from them.

We refer to jurors as the finders of fact because it is their job to determine which side has proven its case in a dispute, but jurors are also instructed on applicable law. Currently, jurors receive instructions from the judge on what laws they are to apply to the facts they have heard. We explain complicated issues to jurors, like negligence, product liability and medical malpractice, but we don't tell them the effect of the answers to the questions on the verdict. Sometimes we tie the jury's hands by only giving them part of the law. This bill is designed to give them instructions on parts of the law that are currently kept from them.

Jurors are sometimes disillusioned and disappointed to learn results are just the opposite of what they intended, because they've been kept in the dark about the law. Juror interviews after trials sometimes show jurors have reached conclusions they did not intend because we don't tell them the consequences of their decisions.

This "blindfold" rule often results in jurors not knowing the legal effect of its verdict in a contributory negligence action. This means jurors are not told about Wisconsin's comparative negligence law in Wis. Stat. § 895.045. Under that statute, the negligence of plaintiff is measured separately of each person found to be negligent. If the plaintiff is more negligent than another negligent person, they do not recover. That would be true even if both defendants were more negligent than the plaintiff. For example, if there are two defendants and the jury finds the plaintiff 40% casually negligent and the finds the two defendants 30% casually negligent, the plaintiff recovers nothing. So, despite both defendants being 60% causally negligent the plaintiff recovers nothing. Another example are employers whose negligent conduct is found responsible for causing their employees' injuries are protected by the worker's compensation law from paying the verdict, yet their names appear on the jury verdict and the jury assesses them a percentage of negligence, which is never recovered.

As an experienced trial attorney, an unintended or unjust verdict is frustrating. But for the client who has endured years of pain and anguish and has waited patiently to have his or her day in court, the effect of the verdict can be tragic. It is difficult to explain to a client the logic behind a rule which, in essence, negates the true intent of the jury's verdict.

Wisconsin is actually in a very small minority of states that refuse to explain to juries the effects of their answers. The Judicial Council found that of the 33 states with comparative negligence systems similar to ours, only Texas and

Wisconsin follow the "blindfold" rule. Most states presently allow jurors to know the legal conclusions which will follow from their verdict. None of our neighboring states has this type of restriction.

What happens when the jury is instructed on only part of the law? Very often what happens is jurors fill in with what they believe the law to be. While we expect jurors to use their everyday experiences in reaching their decisions, they sometimes use their knowledge of "the law" – sometimes accurate knowledge, most often inaccurate – in their decision-making. Juror interviews after trials sometimes show jurors have speculated on how they believe the law will make the case come out. We do not believe this is a failing of jurors, but a normal thought process for them to go through. We believe this bill will give jurors accurate information to use as they deliberate and allow both sides to give an appropriate explanation of the impact. Because both sides can comment on the judge's explanation, we do not believe there will always be a tactical advantage for the plaintiff or for the defendant.

I have attached to this testimony an article that appeared in our association's quarterly publication, The Verdict, in the fall of 1996. This article, authored by our current president, Attorney Christine Bremer Muggli of Wausau, gives a more detailed history and analysis of this proposal. On behalf of the Wisconsin Association for Justice, I urge this committee to support SB 319 for the public policy reasons stated in this article.

As the article notes, this issue has been the subject of some discussion for many years. In 1940, Thomas Ryan wrote in favor of this change in the Wisconsin Law Review. He noted:

> If a judge is more able than the juryman to rise above his predilections, it is because of his knowledge and education. Did the juryman possess the knowledge of the judge, he would be no different from the judge in that particular, and the remedy is not to keep information from him, but to enlighten him to the fullest extent possible; not to curtail his vision, but to extend it; not to make him fearful to take a step, but to be a lamp to his feet — in a word, to treat him as a co-laborer in the temple of justice.

Thank you.

Special Verdicts: Should Jurors Be Informed of the Legal Effect of Their Answers in Comparative Negligence Actions?

by Christine Bremer

It is a well-known principle of Wisconsin law that jurors are not to be informed of the effect of their verdict. They are to answer the questions on the special verdict fairly and justly, but cannot be told what effect those answers will have on the various parties; on the ultimate outcome of the case. We tell these people that it is their civic duty to sit on a jury. We ask them to put their own lives on hold for a day, a week, a month or more in order for justice to be served. We ask their undivided attention to what are, often times, complicated and difficult matters. We then ask them to render verdicts; to pool their collective wisdom and apportion justice to the various parties. But we don't tell them the consequences of their decisions.

How did this system evolve in Wisconsin? How do other states deal with special verdicts? Is justice being served by this system? Is there a better method for dealing with special verdicts? This article will attempt to answer those questions.

History of the Special Verdict

In order to understand the current state of the special verdict in Wisconsin, we must first examine its history. Prior to the year 1856, Wisconsin only utilized general verdicts in jury trials. In 1856, the legislature enacted the Special Verdict Statute.[1] Revised in 1858, this statute gave the courts power to "direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer to which the jury shall make answer in writing."[2] Currently, the Special Verdict Statute in Wisconsin reads as follows:

> Unless it orders otherwise, the court shall direct the jury to return a special verdict. The verdict shall be prepared by the court in the form of written questions relating only to material issues of ultimate fact and admitting a direct answer. The jury shall answer in writing. In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent. The court may also direct the jury to find upon particular questions of fact.[3]

The Special Verdict Statute was analyzed and interpreted for the first time by the Wisconsin Supreme Court in *Ryan v. Rockford Insurance Company*.[4] The Court stated that the purpose of the statute was to "secure a direct answer free from any bias or prejudice in favor or against either party," and then went on to expound the following doctrine:

> [I]t has often been demonstrated in the trial of causes that the non-expert juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias or prejudice; and hence it is common practice for courts, in the submission of such particular questions and special verdicts to charge the jury, in effect, that they have nothing to do with, and must not consider the effect which their answers may have upon, the controversy or the parties.[5]

In effect, the Court in *Ryan* held that it is error to instruct the jury how the special verdict questions should be answered to be consistent with a general verdict for either party. In *Banderob v. Wisconsin Cent. Ry. Co.* the Court further defined that ruling by stating that it is reversible error, by instructions, to inform the jury, **expressly or by necessary implication**, of the effect of their answers (emphasis added).[6]

Since *Ryan* and *Banderob*, the Wisconsin Supreme Court has consistently pointed out that: it is improper to authorize the jury to answer in the form of a legal conclusion;[7] that erroneous instructions, with regard to special verdict questions, are generally prejudicial;[8] that it is improper to read the comparative negligence statute to the jury as it instructs the jury as to the effect of their answers;[9] and that the court must not, in its charge to the jury, inform them of the ultimate result of

their answers.[10]

This doctrine has been upheld in Wisconsin for more than 100 years. More recently, the Wisconsin Supreme Court discussed, at some length, the wisdom behind the special verdict doctrine in *McGowan v. Story*.[11] In *McGowan*, the plaintiff was injured while transferring hot tar from his employer's truck to a distributor's vehicle. The case was tried to a jury, who found the plaintiff 50% negligent, employer 30% negligent, and the distributor 20% negligent. During the course of their deliberations, the jury returned to the courtroom and asked to be advised of the effect of its answers on the rights of the parties. The trial judge refused to so advise the jury. It should also be noted that the plaintiff had requested a general verdict, which would have made the effect of the jury's answer apparent. That request was also denied.

The Wisconsin Supreme Court agreed with the trial judge's decision, stating that "the judge was foreclosed by the law of this state from advising the jury."[12] Although the Court made mention of plaintiff's, and others', criticism of the rule, it nonetheless held fast to the age old tradition, stating as follows:

> It is argued that the refusal to fully inform the jurors is contrary to the traditional trust we place in the ability of juries to do justice. Of course, this criticism is in itself based on a fundamental distrust of the jury system, for it assumes that jurors are not faithful to their oath to follow the instructions of the trial judge. We decline to explore the pros and cons of this controversy, because any change in the rule would be contrary to the established basis for the use of juries, particularly in negligence cases. ...We suggest that the jury should be admonished, and impressed, that its function in a negligence case is factfinding only and that it is not its role to usurp the legislative function or the judicial function in interpreting the comparative negligence statute. It is the role of the judge, and not the jury, to implement the general policies of the comparative negligence statute.[13]

Since the Court's ruling in *McGowan*, there have been no changes, legislative or judicial, made in the special verdict doctrine. Despite the fact that the doctrine pre-dates Wisconsin's comparative negligence law, Wisconsin courts have consistently applied it to comparative negligence actions, without considering the implications of doing so.[14]

Special Verdicts in Other Jurisdictions

Wisconsin is one of only a few states which does not allow a jury to know the legal consequences of its verdict. In addition to Wisconsin, only Arkansas, Hawaii and Massachusetts have adopted similar provisions.[15] Other jurisdictions have been much more realistic in their views of the jury system.

In Indiana, the legislature decided juries should be informed of the effect of their verdicts, although 1995 tort "reform" legislation somewhat limited this procedure.[16] Juries are no longer informed about any immunities available to a nonparty or about limitations placed on punitive damage awards. Experience will show how the defense bar may use or attempt to broaden these limitations.

In Minnesota, whose comparative negligence law was modeled directly on Wisconsin's law, the rules of civil procedure grant broad discretion to trial courts in informing the jury.[17] Idaho, which has a 50% comparative negligence system, has legislatively mandated their confidence in juries.[18] In Utah, the state Supreme Court held that a jury could not be informed of the consequences of its verdict;[19] however, after further consideration, the Court subsequently reversed its position on this issue[20] and ruled that juries should be so informed.

Colorado struggled with this issue for some time before settling on its current "pro-inform" position. In *Simpson v. Anderson*, the Colorado Court of Appeals held that juries should be informed of the legal effect of their apportionment of negligence, since the law of comparative negligence is not secret.[21] The Colorado Supreme Court subsequently reversed the holding and argued that such a disclosure to the jury would influence jury verdicts and displace the function of a trial judge.[22] Thereafter, the Colorado legislature restored the holding of the Court of Appeals by adopting the following statutory mandate:

> In a jury trial in any civil action in which contributory negligence is an issue for determination by the jury, the trial court shall instruct the jury on the effect of its findings as to the degree of negligence of each party. The attorneys for each party shall be allowed to argue the effect of the instruction on the facts which are before the jury.[23]

In Kansas, the issue of informing the jury of the effect of their verdict came before the Kansas Supreme Court in *Thomas v. Board of T. Trustees*.[24] In discussing the rationale behind the rule, the Court pointed out the following reasons why the rule should not be followed

indiscriminately:

> (1) [I]t is a senseless practice, since an intelligent juror will in most cases already have a good idea of what effect his answers will have on the ultimate verdict; (2) adherence to the rule can and has led juries to speculate unnecessarily as to the meaning of the law, resulting in mistaken verdicts that do not reflect the true intent of the jury; (3) the rule is an unwarranted intrusion on the traditional role of the jury to temper harsh rules of law and see that substantial justice is done between parties.[25]

The Kansas Court further held that juries **should** be informed of the effect of their verdict, especially in comparative negligence cases (emphasis added). Explaining their reasoning, the Court stated:

> In our judgment, the rule ignores the reality that jurors often do concern themselves with the practical effects of their findings, and without being informed by the Court, will undoubtedly speculate as to the result of their verdict. Under the Kansas comparative negligence statute, if a jury finds that the defendant and plaintiff were equally at fault, the plaintiff recovers nothing. Expecting the defendant to recover 50% of his damages, the unknowing jury will insure that he receives nothing. Furthermore, we believe that there is a real danger of a jury taking upon itself to decrease the damage award by the percentage of plaintiff's negligence unless it is informed that the required deduction is a statutory duty of the trial court.[26]

In 1995, the Wisconsin comparative negligence statute was revised. It now provides that the negligence of the plaintiff shall be measured separately against **each** person found to be causally negligent.[27] Furthermore, liability for persons whose negligence is less than 51% is limited to the percentage of causal negligence attributable to that person.[28] Joint and several liability only applies where the person is 51% or more causally negligent.[29] Without being informed of these rules of law, a jury could very well render a verdict in which they believe they are awarding money damages to the plaintiff, but which, in reality, awards her nothing.

Consequences of an Uninformed Jury

As stated above, a jury that is not informed of the legal effect of their special verdict answers in comparative negligence cases can, and often does, render unintended verdicts. A case in point illustrates the perils of an uninformed jury.

In 1994, our firm tried a personal injury case to a jury in Wisconsin Rapids. The case involved the scalding of an elderly woman in the bathtub of her rented apartment. The jury decided that our client was 60% negligent for her own injuries (the landlord was apportioned 40%), but awarded her $458,056.51 in damages. After conducting an informal poll of the jury, we learned that they fully intended to award our client monetary damages and, in fact, were confident that they had done so by virtue of entering specific dollar figures on the special verdict form.

Once informed that the effect of their verdict was to award the plaintiff nothing, the members of the jury were shocked and upset, to say the least. In fact, one jury member was so bothered by the actual outcome, that she paid a visit to our client to apologize for the jury's verdict.

Any experienced trial attorney is likely to have several similar stories to relate. We are all frustrated when a hard-fought case produces such an unintended and unjust verdict. But for the client who has endured years of pain and suffering and has waited patiently to have their day in court, the effect of such a verdict can be tragic.

It is difficult to understand the logic behind a rule which, in essence, negates the true intent of a jury's verdict. The Kansas Supreme Court, in *Thomas v. Board of T. Trustees,*[30] attempted to explain that logic as follows:

> The rule which forbids the jury to be informed of the legal effects of its answers assumes that a jury should not concern itself with the practical effect of its apportionment of negligence and that a jury will operate more effectively in a vacuum.

This logic is contradictory to the essential principles of comparative negligence. Since the early 1970's, when the principles of comparative negligence became widely recognized, the role of the jury in negligence actions has changed dramatically. Verdicts requiring simple "yes" or "no" answers were no longer the norm. Juries were now being asked to quantify specific findings of relative fault. The concept of damage apportionment is predicated on its inherent fairness and on the trust we place in jurors. In mandating that citizens participate in the civil jury system, we bestow our faith and trust in their ability to impartially weigh and consider the evidence and to render a fair verdict. Is it not inconsistent that we then "blindfold" the jury and prevent it from knowing the legal effect of

the special verdict findings?

It is more than inconsistent to expect a jury to operate in a vacuum, it is dangerous. In *Seppi v. Betty*,[31] the Idaho Supreme Court observed that jurors frequently adjust their special verdict answers to achieve a predetermined result. If the legal effect of the answers is not obvious, the jury will speculate, often incorrectly, about the legal effect and thereby subvert the fact-finding process.[32] This problem is accentuated in a modified 49% comparative negligence state by the attractiveness of the fifty-fifty allocation.

In restricting the information we give to the jury, we risk not only unjust verdicts, but disillusioned citizens. Jurors take their duty very seriously. Most work diligently to render fair and impartial verdicts. However, when they are informed that the actual outcome is different than what they decided, most jurors feel guilty, disappointed, used and even angry. Such negative jury experiences serve not only to disillusion individual citizens but to heap unnecessary cynical criticism on our already tarnished legal system.

A Proposal for Change

Changes can be made in our civil jury system, changes that will improve the litigation process for all participants and will restore a more equitable image to the overall legal system. Wisconsin should adopt an "ultimate outcome" jury instruction or should change the language of the special verdict statute.

Such a change in the statute was attempted in 1985. Senate Bill 57 was introduced by Senator Chvala and then State Senator Feingold and was co-sponsored by then Representatives Hauke, Wimmer and T. Thompson. The proposed change read as follows:

> SECTION 1. 805.13(4) of the statutes is amended to read:
>
> 805. 13(4) INSTRUCTION: The Court shall instruct the jury before or after closing arguments of counsel. Failure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error. The court shall provide the jury with one complete set of written instructions providing the substantive law to be applied to the case to be decided. **The court shall explain to the jury the legal conclusions which will follow from its possible findings and counsel may comment on the explanation** (emphasis added)."[33]

Unfortunately, no action was taken on this bill and it died at the end of the 1985 session. The original drafters of this bill did not re-introduce it in subsequent sessions. To date, Wisconsin has not amended the special verdict statute, nor have we adopted an "ultimate outcome" jury instruction.

Although Minnesota modeled its comparative negligence law closely on Wisconsin's, it went a step further by allowing trial courts to inform juries of the effect of their answers. In Minnesota, in all comparative negligence cases, "the court shall inform the jury of the effect of its answers to the percentage of negligence questions and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law, or complex issues of law or fact are involved, which may render such instruction or comment erroneous, misleading or confusing to the jury."[34] In accordance with this court rule, the following is a sample special verdict form used in Minnesota:

SPECIAL VERDICT FORM NUMBER 1

COMPARATIVE NEGLIGENCE (FAULT) - TWO OR MORE PARTIES

If you have answered "yes" to questions _____, _____ and _____, then answer this question:

~~Taking the combined (negligence) (fault)~~ which contributed to the accident as 100%, what percentage thereof do you attribute to:

A. (name) _____ %
B. (name) _____ %
C. (name) _____ %
D. (name) _____ %

TOTAL 100%

_____(claimant's name) may not recover from a defendant when

_____(claimant's name) (negligence) (fault) is greater than the (negligence) (fault) of the defendant.[35]

By conditioning the application of the "inform the jury" rule on the discretion of the trial court, Minnesota allows its civil jury system to be flexible—a much needed quality for such a system if it is to remain viable and fair. It may very well be advantageous to treat a complex, multi-party products liability case differently than a straightforward, two-party personal injury case in

terms of the instructions given to the jury. In Minnesota, as well as other states,[36] trial courts are given the opportunity, on a case-by-case basis, to objectively decide on the proper amount of information to be given to the jury. Certainly this method is preferable to the inflexible, and often unjust, method used in Wisconsin.

This flexibility is particularly important in light of the comparative negligence reforms of 1995. A jury deciding a complex, multi-party case treads upon particularly tricky applications of law and the jury must do so blindfolded. Today, any defendant that is less than 51% at fault will not be held jointly liable. In addition, that same defendant is only responsible up to their percentage of causation. Without this knowledge, a jury blindly allocating liability may circumvent an honest intention to compensate plaintiffs.

In deciding whether Wisconsin's rule against informing should or should not be changed, perhaps we should keep in mind two important points. First, today's jurors are much more sophisticated and have more education and training than they did in 1890. What may have been true for juries more than 100 years ago, may not be true in this day and age. Second, we must not lose sight of the underlying principle of our jury system; namely, our belief that juries can impartially weigh all aspects of a case and enter a fair and just verdict.

Although this issue has been debated for some time in Wisconsin, the most eloquent petition for change was made by Thomas Ryan, writing for the Wisconsin Law Review, more than 50 years ago:

> If a judge is more able than the juryman to rise above his predilections, it is because of his knowledge and education. Did the juryman possess the knowledge of the judge, he would be no different from the judge in that particular, and the remedy is not to keep information from him, but to enlighten him to the fullest extent possible; not to curtail his vision, but to extend it; not to make him fearful to take a step, but to be a lamp to his feet—in a word, to treat him as a co-laborer in the temple of justice. Assuming him to be inferior and unworthy of full confidence and presuming that his knowledge of the effect of his answers upon the ultimate right of a party to recover would cause his prejudices to dictate his answers to the questions of the special verdict, is to adjudge him to be dishonest or at least an inefficient juryman.[37]

We should not continue to accept verdicts from juries that are forced to decide important issues while wearing blinders. We can and should improve our civil jury system by allowing juries to be informed of the effect of their answers in comparative negligence cases.

***Christine Bremer** is a shareholder in the Wausau law firm of Grischke & Bremer, S.C. She received her undergraduate degree from Loyola University in Chicago and her law degree from Loyola University School of Law in 1978. She is a sustaining member of the Wisconsin Academy of Trial Lawyers and serves on its Board of Directors and also serves as an editor of* The Verdict. *In addition, she is a member of the Communications Committee of the State Bar of Wisconsin and she is a member of the Marathon County Bar Association, the Association of Trial Lawyers of America, and the American Bar Association.*

The author gratefully acknowledges the assistance of Judy Frymark, legal assistant, in the research of this article.

Endnotes

1 Wis. Laws 1856. c. 120, Sec. 171.
2 Rev. Stat. (1858) c. 132, Sec. 11.
3 Wis. Stats., Section 805.12(1).
4 77 Wis. 611, 46 N.W. 885 (1890).
5 *Id.* at 615, 46 N.W. at 886.
6 133 Wis. 249, 113 N.W. 738 (1907).
7 *New Home Sewing Machine Co. v. Simon* 104 Wis.120, 80 N.W.71 (1899). See also: *Meycr v. Home Insurance* Co., 127 Wis. 293, 106 N.W. 1087 (1906),; *Van De Bogart v. Marinette & Menomonee Paper Co.,* 127 Wis. 104,106 N.W.805 (1906); *Lyon v. City of Grand Rapids,* 121 Wis.609,99 N.W.311 (1904); *Gutzman v. Clancy,* 114 Wis. 589, 90 N.W. 1081, 58 L.R.A. 744 (1902); *Byrington v. City of Merrill,* 112 Wis. 211, 88 N.W. 26 (1901).
8 *De Groot v. Van Akkeren,* 225 Wis. 105, 273 N.W. 725 (1937).
9 *Id.*
10 *Bauer v. Richter,* 103 Wis.412,79 N.W.404 (1989). See also: *Cullen v. Hanisch,* 114 Wis. 24, 89 N.W. 900 (1902); *Sheppard v. Rosenkrans,* 109 Wis. 58, 85 N.W. 199, 83 Am.St.R. 886 (1901); *Brunette v. Town of Gagen,* 106 Wis. 618, 82 N.W. 564 (1900).
11 70 Wis.2d 189, 234 N.W.2d 325 (1975).
12 *Id.* at 234 N.W.2d at 328.
13 *Id.* at 234 N.W.2d at 329-330.
14 See *Erb Mutual Service Gas Co.,* 20 Wis.2d 530 (1963); and *McGowan v. Story, supra.*
15 See *Argo v. Blackshear,* 416 S.W.2d 314 (Ark. 1967); Hawaii Rev. Stats. Sec. 663.31(b) (1983 Supp.); Mass. Gen. Laws Ann., Ch. 231, Sec. 85 (1984-1985 Supp.).
16 Ind. Stats. Ann., Sec. 34-4-33-5 (1995). See generally Sections 34-4-33-4 to 34-4-33-6 (1995).
17 Minnesota Rules of Civil Procedure, Rule 49.01(2). See also, 1969 *Legislative Committee Comment* to Sec. 604.01, Minnesota Statutes Annotated.

[18] Idaho Code Ann., Sec. 6-801.

[19] *McGinn v. Utah Power & Light Company,* 529 P.2d 423, 424 (Utah 1974).

[20] *Dixon v. Stewart,* 658 P.2d 591, 596 (Utah 1982).

[21] 517 P.2d 416 (Colorado 1973).

[22] 526 P.2d 298 (Colorado 1974).

[23] Colo. Rev. Stat. 1973, Sec. 13-21-111(4).

[24] 582 P.2d 271 (Kan. 1973).

[25] *Id.* at 280.

[26] *Id.* at 281-282.

[27] Wis. Stat. Ann. Sec. 895.045(1)(1995).

[28] *Id.*

[29] *Id.*

[30] 582 P.2d at 281-282.

[31] 99 Idaho 186, 579 P.2d 683 (1978).

[32] 99 Idaho at 193, 579 P.2d at 690.

[33] 1985 Senate Bill 57.

[34] Minnesota Rules of Civil Procedure, Rule 49.01(2).

[35] 4 Minn. Prac. JIG 3rd Ed.-18.

[36] See Hawaii Rev. Stat. Sec. 663-31(d) (1976); Nev. Rev. Stat. Sec. 41.141-2 (1979); N.D. Cent. Code Sec. 9-10-07 (1975); Wyo. Stat. Sec. 1-1-lO9(iii) (1977).

[37] Thomas H. Ryan, *Are Instructions Which Inform The Jury Of The Effect Of Their Answers Inimical to Justice?,* 1940 Wis. Law Rev. 400, 402 (May, 1940).

TO: Members, Senate Committee on Judiciary & Corrections

FROM: James J. Mathie, President, Civil Trial Counsel of Wisconsin
James Hough, Legislative Director, Civil Trial Counsel of Wisconsin

DATE: January 29, 2008

RE: **Opposition to 2007 Senate Bill 319**

For over one hundred years, Wisconsin courts have followed the well-settled principle that the duty of the jury is to resolve questions of fact and that it is error to have the jury instructed on how its findings of fact will be impacted by the application of existing law.

This well-settled principle implements Wisconsin jurisprudence that the legislature should make the laws, the jury should find the facts and the judge should apply the law based upon the facts found by the jury.

The legislature acts dispassionately in determining the law of the land without reference to the specific facts that may arise in a particular case.

Likewise, the jury acts to find the facts without the specific knowledge of how those facts once found will interact with the law.

Finally the judge applies the facts and law to reach an impartial decision, yet subject to appellate review.

This delicate balance, as best as can be accomplished, guarantees blind justice because no single actor – not the legislature, nor the jury, nor even the judge – has complete control over the ultimate decision. The legislature can pass the law but cannot determine the facts that may arise. The jury can determine the facts but is unaware how the law will be applied to them. And the judge applies the law and facts, neither of which the judge controls.

Allowing the jury to understand the impact of its verdict upsets this delicate balance. It allows a single actor – the jury – to control the outcome of civil litigation simply by modifying its responses to create the desired result.

Passage of this single piece of legislation would undermine more than one hundred years of Wisconsin jurisprudence and would eliminate the integrity of the civil justice system. The practical effect would be to convert special verdicts that find facts which the judge applies to the law into veiled general verdicts that generate desired results and usurp the judge's role.

Indeed, this legislation would turn the system literally upside-down. Rather than considering all of the evidence and reaching a reasoned result, the jury would be encouraged to consider the intended result and only look for evidence to support that

result or perhaps to disregard whether evidence even exists in light of the necessity to answer in a particular fashion to reach the desired result.

And the role of a juror would become significantly more difficult. Juries are instructed to "consider the case fairly, honestly, impartially and in the light of reason and common sense." They are told, "Free your minds of all feelings of sympathy, bias or prejudice." Yet allowing the jury to know the impact of its verdict will make it markedly more difficult for jurors to dispassionately fulfill their duty, knowing the individual impact that will result from particular answers on the special verdict.

Every lawyer knows the saying "bad facts make bad law." It refers to the situation where the facts of a case are so sympathetic or compelling that even the appellate court will feel compelled to issue a result-oriented decision, notwithstanding its impact on the law. Jurors, not accustomed to dealing with the sympathy that typically arises in civil litigation will be far more susceptible to deciding based upon the result rather than the evidence.

The primary argument that has been advanced in support of the changed is that some juries may attempt to obtain a certain result and fail while others may understand how to obtain a certain result and succeed. Consequently, to put all juries on an equal footing they should be advised of the effect of their responses on the special verdict. The argument however is a fallacy.

In either case, the jurors must disregard their oaths to accomplish their result-oriented decision. Advising jurors of the effect of their verdict would simply institutionalize what is a rare circumstance. The risk that a rogue jury would collectively disregard its oath is not remedied by encouraging all juries to do so.

The Wisconsin Supreme Court has regularly rejected the concept of advising the jury of the effect of its verdict and best set forth its reasoning in ***McGowan v. Story***, 70 Wis. 2d 189, 197-99, 234 N.W.2d 325 (1974). The Supreme Court's analysis warrants repeating here:

> The plaintiff points out that some juries, misinformed or ignorant of the effect of their answers, will make findings which they believe will "do justice," but which do not in law have the result intended. Other juries, who either by experience or correct prior information, understand the effect of their answers, will be able to adjust their findings to accomplish the result desired. This disparity of conduct, plaintiff alleges, results in the denial of equal justice, which can be alleviated only by having the trial judge tell the jury the effect of its answers.
>
> It is argued that the refusal to fully inform the jurors is contrary to the traditional trust we place in the ability of juries to do justice. Of course, this criticism is in itself based upon a fundamental distrust of the jury system, for it assumes that jurors are not faithful to their oath to follow the instructions of the trial judge. We decline to explore the pros and cons of this controversy, because any change in

the rule would be contrary to the established basis for the use of juries, particularly in negligence cases.

With the exception of the cursory dicta in the cited dissent of Mr. Chief Justice Hallows, the plaintiff's point of view has no support in Wisconsin law.

The rationale of our present rule is explained in ***Ryan v. Rockford Ins. Co.***, 77 Wis. 611, 615, 616, 46 N.W. 885 (1890), wherein this court said:

> The purpose of thus submitting particular controverted questions of fact is to secure a direct answer free from any bias or prejudice in favor of or against either party. . . . It has often been demonstrated in the trial of causes that the non-expert juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice . . . ."

Also, in ***Anderson v. Seelow***, 224 Wis. 230, 234, 271 N.W. 844 (1937), we said:

> The sole purpose of a special verdict is to get the jury to answer each question according to the evidence, regardless of the effect or supposed effect of the answer upon the rights of the parties as to recovery. To inform them of the effect of their answer in this respect is to frustrate this purpose." *See also* ***Kobelinski v. Milwaukee & Suburban Transport Corp.***, 56 Wis. 2d 504, 521, 202 N.W.2d 415 (1972).

Under our system of jurisprudence, the jury is the finder of fact and it has no function in determining how the law should be applied to the facts found. It is not the function of a jury in a case between private parties on the determination of comparative negligence to be influenced by sympathy for either party, nor should it attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors.

Moreover, under the Wisconsin comparative negligence law, where multiple parties are involved the effect of a jury's apportionment of negligence and the impact of the comparison of negligence between negligent tort-feasors can be complex indeed. It is occasionally apparent that these complexities are not understood by lawyers and try the deliberative faculties of judges.

While we recognize the validity of the problem posed by the plaintiff, there is no evidence that the remedy of advising a jury of the effect of its answers would not result in jury confusion and create a situation more to be deplored than that which presently exists.

We suggest that the jury should be admonished, and impressed, that its function in a negligence case is factfinding only and that it is not its role to usurp the

> legislative function under the comparative negligence law or the judicial function in interpreting the comparative negligence law. It is the role of the judge, acting under the law, and not the jury, to implement the general policies of the comparative negligence statute. We decline to consider the change in the jury function proposed by the plaintiff.

There is no reason to change Wisconsin jurisprudence in this fundamental fashion. We urge this committee to oppose this misguided legislation.

Wisconsin Coalition for Civil Justice

TO: Members, Senate Committee on Judiciary & Corrections

FROM: Bill Smith, President & Jim Hough, Legislative Director, on behalf of The Wisconsin Coalition for Civil Justice

DATE: January 29, 2008

RE: **OPPOSITION TO SENATE BILL 319**

The Wisconsin Coalition for Civil Justice respectfully urges that the committee not advance this legislation.

The role of juries is to determine who is telling the truth and to resolve the factual issues. It is the duty of the judge, not the jury, to apply rules of law, including the application of the comparative negligence statute.

Prior to comparative negligence, plaintiffs who were found as little as 1% at fault were banned from recover. Wisconsin was a pioneer in comparing fault between plaintiffs and defendants in order that an injured party who was less at fault could recover a portion of damages. This progressive system allows parties who have contributed to their own injuries to recover damages in relation to comparative fault at or below 50%.

To suggest – as Senate Bill 319 does – that juries be permitted to manipulate facts regarding comparative fault to achieve a pre-determined mandatory result makes a mockery of the jury system and is contrary to longstanding legislative intent.

If the theory is that every person should recover some money for injuries sustained regardless of fault, perhaps we should abolish the jury system, and substitute a form of worker's compensation for all injured parties.

Proponents of SB 319 want the best of all worlds – juries who set high awards – and a system that allows a person most at fault to collect substantial dollars from one minimally at fault – thereby creating another victim and clear inequity.

Again, we respectfully urge your opposition to SB 319.